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As of: Jan 23, 2009

STATE OF MONTANA, Plaintiff and Appellant, v. JERRY AAKRE, Defendant and Respondent.

No. 01-321

SUPREME COURT OF MONTANA

2002 MT 101; 309 Mont. 403; 46 P.3d 648; 2002 Mont. LEXIS 191

December 20, 2001, Submitted on Briefs
May 10, 2002, Decided

SUBSEQUENT HISTORY: Released for Publication May 29, 2002.

PRIOR HISTORY: APPEAL FROM: District Court of the Eighth Judicial District, In and for the County of Cascade, The Honorable Kenneth R. Neill, Judge presiding.

DISPOSITION: Affirmed.

COUNSEL: For Appellant: Mike McGrath, Montana Attorney General, John Paulson, Assistant Montana Attorney General, Helena, Montana; Brant S. Light, Cascade County Attorney, Susan Brooke, Deputy Cascade County Attorney, Great Falls, Montana.

For Respondent: Scott Albers, Great Falls, Montana.

JUDGES: Justice James C. Nelson delivered the Opinion of the Court. We Concur: TERRY N. TRIEWEILER, PATRICIA COTTER, W. WILLIAM LEAPHART.

OPINION BY: James C. Nelson

OPINION

[**405] [***649] Justice James C. Nelson delivered the Opinion of the Court.

[*P1] Jerry Aakre (Aakre) was charged by information on June 21, 1999, with three counts of sexual assault in violation of *§ 45-5-502, MCA*, in the Eighth Judicial District Court, Cascade County. Before trial, one count was withdrawn by the State. After a trial in which the jury found him guilty on one count, Aakre made a motion for a new trial on the grounds that other crimes evidence of previous sexual assaults was improperly admitted against him under our decision in *State v. Sweeney, 2000 MT 74, 299 Mont. 111, 999 P.2d 296*. The District Court granted the motion. Pursuant to *§ 46-20-103(c), MCA*, the State appeals this decision, asserting that the other crimes evidence was properly admitted against Aakre as evidence of common scheme or evidence of absence of mistake or accident.

[*P2] We address the following issue on appeal: Did the District Court properly grant Aakre's motion for a new trial on the grounds that evidence of his prior acts was erroneously admitted during his trial for sexual assault?

[*P3] We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[*P4] On June 21, 1999, Aakre was charged by information with three counts of sexual assault against his step-granddaughter, A.S. Before trial the State gave notice, as required by the modified *Just* rule, of its intent to introduce evidence of Aakre's other crimes. The State intended to introduce evidence that Aakre pled guilty to continuous [**406] sexual assaults over a two year period against two stepdaughters from a previous marriage 16 years earlier. In its brief in support of its *Just* notice, the State only offered testimony from one of the stepdaughters. Aakre opposed the introduction of this evidence.

[*P5] In the prior crimes, Aakre asked his stepdaughter to come to his bedroom when [***650] her

mother was absent, directed her to take her pants down, stroked her vagina with his index finger, and kissed her on the mouth. Further, he had her rub initially his stomach and then his penis. In the alleged crime, i.e., the current charges, Aakre's acts were similar, except for the allegation that he would place A.S. on his pelvis and move her back and forth rather than have her rub his stomach.

[*P6] The District Court ruled that the evidence properly conformed to the requirements of the *Just* rule and allowed the evidence to be introduced. The District Court found that the crimes involved in the prior guilty plea and the alleged crimes on trial were sufficiently similar to establish a plan or modus operandi because of the similarity of the incidents and because both involved a continuous pattern of conduct rather than a single instance of conduct.

[*P7] The jury found Aakre guilty of the count of continuous sexual assault while in the home and not guilty on the second count which alleged a sexual assault in a vehicle. After trial, Aakre moved for a new trial on the grounds that the other crimes evidence was improperly admitted under our decision in *Sweeney*. The District Court granted the motion, concluding that *Sweeney* controlled the admission of other crimes evidence in Aakre's case. The State now appeals, asserting that the District Court erred because Aakre's prior plea was admissible as evidence of common scheme or absence of mistake or accident.

II. STANDARD OF REVIEW

[*P8] We review a trial court's decision to grant a new trial for abuse of discretion. *State v. Bell (1996), 277 Mont. 482, 485, 923 P.2d 524, 526.* Evidentiary rulings regarding whether evidence is relevant and admissible are also reviewed for abuse of discretion. *State v. Whitlow (1997), 285 Mont. 430, 437, 949 P.2d 239, 244.* Determinations of law integral to the grant of a new trial are reviewed *de novo. Bell, 277 Mont. at 486, 923 P.2d at 526.* While we have applied the abuse of discretion standard to other crimes issues, we have not specifically stated the standard of review applicable to rulings on other crimes evidence under the *Just* rule. Because the admission of other crimes is directed to the relevance and admissibility of such evidence, we now [**407] specifically hold that we will review a trial court's decision on whether to admit evidence of other crimes, wrongs or acts under Rule 404(b), M.R.Evid., for abuse of discretion.

[*P9] There are four substantive criteria under Rule 404(b), M.R.Evid., that must be met before evidence of other crimes, wrongs or acts can be admitted in the trial of the current charge. These criteria were stated in *State v. Just (1979), 184 Mont. 262, 602 P.2d 957*, were modified by *State v. Matt 249 Mt 136,* and are as follows:

> (1) The other crimes, wrongs or acts must be similar.
>
> (2) The other crimes, wrongs or acts must not be remote in time.
>
> (3) The evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity with such character; but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> (4) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

State v. Matt (1991), 249 Mont. 136, 142, 814 P.2d 52, 56. In this case, the only criteria at issue is the third prong of the *Just* rule, the purpose of proof for which the evidence is offered.

[*P10] The District Court found that evidence of Aakre's prior guilty plea should not have been admitted at trial under our decision in *Sweeney* and therefore granted the motion for a new trial. The State now argues that Aakre's previous crimes were properly admitted as evidence of common scheme and as evidence of absence of mistake or accident. The State asserts that the District Court incorrectly applied *Sweeney* to the facts of this case. *Sweeney* involved whether [***651] the admission of a defendant's prior conviction for sexual assault against his stepdaughter was properly admitted in the defendant's trial of sexual assault against his niece which allegedly occurred seven years later. *Sweeney, 299 Mt 74, 7, 15.* We held that the prior conviction did not satisfy the *Just* rule and should not have been admitted as evidence of identity, intent, motive, or knowledge. *Sweeney, 299 Mt 111, 35.*

[*P11] While *Sweeney* did not directly address the issue of common scheme or the issue of absence of mistake or accident, *Sweeney* does require that each allowable purpose under Rule 404(b), M.R.Evid, asserted by the State be analyzed by a trial court to determine whether [**408] the evidence supports that specific

purpose. *Sweeney, 299 Mt 111, 23* (analysis addresses each purpose identified by the State). *Sweeney* teaches that before other crimes evidence can be admitted under Rule 404(b), M.R.Evid., the purpose justifying the admission of the evidence must be at issue in the current charge. For example, if intent is not at issue, then other crimes evidence on that point is not admissible under the third prong of the modified *Just* rule. *See Sweeney, 299 Mt 111, 22-36.* We hold here, as discussed below, that the District Court did not abuse its discretion in granting Aakre a new trial because the prior acts evidence should not have been admitted in Aakre's first trial as evidence of either common scheme or absence of mistake or accident.

III. DISCUSSION

A. Common Scheme

[*P12] Under Rule 404(a), M.R.Evid., evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. The purpose of this rule is to prevent convictions that are merely based on a jury finding that someone has a propensity to do certain things. *Sweeney, 299 Mt 111, 35.* The rule furthers the purpose to inform the defendant of the charges against him, *Just, 184 Mont. at 273, 602 P.2d at 963*; prevents convictions based on finding the defendant is a bad person, *State v. Tiedemann (1961), 139 Mont. 237, 242, 362 P.2d 529, 531*; and prevents convictions for one crime based on evidence of another, *Matt, 249 Mont. at 143, 814 P.2d at 56* (requiring jury instruction to emphasize that the defendant is not being tried and may not be convicted for any offense except that charged); *see also State v. Sanders (1971), 158 Mont. 113, 119, 489 P.2d 371, 374.* Further, in order to uphold the intent of the rule, exceptions to this rule must be clearly justified and carefully limited. *Sweeney, 299 Mt 111, 16.*

[*P13] Exceptions are allowed by Rule 404, M.R.Evid., when character is in issue or when past acts that may have character implications nonetheless serve as independent proof of a material issue. Rule 404(b), M.R.Evid., allows admission when other crimes, wrongs or acts prove motive, opportunity, intent, preparation, knowledge, identity, absence of mistake or accident, or, as discussed here, when other crimes prove defendant's "plan."

[*P14] "Plan," though referred to in Rule 404(b), is not a defined term of art in the context of Title 45. Notwithstanding, a "plan" is nothing more than "a method for achieving an end." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 889 (10th ed. 1997). This definition of "plan" [**409] is encompassed within the definition of "common scheme" under *§ 45-2-101(7), MCA*. Under *§ 45-2-101(7), MCA*, "common scheme" is defined as:

> a series of acts or omissions motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan that results in the repeated commission of the same offense or that affects the same person or the same persons or the property of the same person or persons. [1]

1 We note that the definition of "common scheme" under *§ 45-2-101(7), MCA*, is virtually identical to the definition of "same transaction," as set forth under *§ 46-1-202(23), MCA.*

[*P15] While we usually discuss the statutory definition of "common scheme" in cases involving theft or forgery where the charging information specifically cites the statute, for Rule 404(b) purposes, our prior case law, nonetheless, typically uses the phrase "common scheme" in conjunction with and interchangeably with the word "plan." *See for* [***652] *example State v. Rogers, 1999 MT 305, P39, 297 Mont. 188, P39, 992 P.2d 229, P39.*

[*P16] Accordingly, where the admissibility of other crimes, wrongs or acts is at issue under Rule 404(b), we now hold that, in the context of criminal cases and for purposes of the *Just/Matt* test, "plan" and "common scheme" are synonymous.

[*P17] Whether there is a common scheme involves a case by case analysis of the defendant's actions. *Rogers, 297 Mt 188, 39.* Turning, then, to the statutory definition, the evidence of the prior crimes admitted under the *Just* rule in this case did not involve the "same person or the same persons or the property of the same person or persons." Aakre's prior offense--involving two other stepdaughters--did not involve the same person or persons in the current charge, namely, A.S. *See Just, 184 Mont. at 269, 602 P.2d at 961* (prior acts involved the same victim); *State v. Medina (1990), 245 Mont. 25, 31, 798 P.2d 1032, 1036 overruled on other grounds by State v. Olson (1997),* ***286 Mont. 364, 951 P.2d 571***; *State v. Gilpin (1988), 232 Mont. 56, 756 P.2d 445*; *see also State v. Henderson (1996), 278 Mont. 376, 382, 925 P.2d 475, 479* (father manipulating sons to perform sexual acts with daughter was evidence of common scheme in father' s trial of sexual intercourse without consent against daughter); *State v. Murray (1987), 228 Mont. 125, 134, 741 P.2d 759, 764-65* (prior disciplinary acts of mother against daughter in trial of beating death were admissible as common scheme).

[**410] [*P18] Further, the evidence of the prior crimes admitted in the case at bar did not prove that Aakre "was motivated by a purpose to accomplish a single criminal objective." This part of the "common scheme" definition contemplates the demonstration of an

overall plan with interrelated or sequential crimes that require overlapping proof and where commission of one crime depends on the commission of another. *See State v. Southern,1999 MT 94, P23-24, 294 Mont. 225, P23-24, 980 P.2d 3, P23-24* (counts of kidnaping, burglary, theft, and sexual intercourse without consent were part of a common scheme); *State v. Davis (1992), 253 Mont. 50, 59, 830 P.2d 1309, 1315-16* (tampering with evidence from another crime during investigation of sexual assault made proof overlap on tampering charge, so other crime was admissible); Edward J. Imwinkelried, *Using a Contextual Construction to Resolve the Dispute over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b), 43 U. Kan. L. Rev. 1005* (discussing interpretations of the word " plan" in *Rule 404(b), Fed.R.Evid.*) (hereinafter Imwinkelried). Here, the other crimes evidence did not show that Aakre's commission of the current charge was part of an overall plan involving interrelated or sequential crimes that require overlapping proof or where the commission of one crime depends on the commission of another.

[*P19] Rather, under the definition of common scheme applicable here, it was the burden of the State to show that the other crimes evidence went to prove that Aakre was motivated by "a common purpose or plan that results in the repeated commission of the same offense."

[*P20] With regard to this part of the statutory definition of common scheme, we have held that a common scheme exists where a defendant employs distinctive or idiosyncratic methods to lure victims into vulnerable positions that enable sexual assault. *See State v. Martin (1996), 279 Mont. 185, 195, 926 P.2d 1380, 1386-87* (defendant asked each minor victim to help with work at his cabin, gave each victim excessive alcohol); *State v. Brooks (1993), 260 Mont. 79, 81, 857 P.2d 734, 735* (systematic plan to entertain boys in recreational pool setting in which they feel comfortable while basically unclothed, then catching them off-guard with sexual assault constituted common scheme); *State v. Norris (1984), 212 Mont. 427, 431-32, 689 P.2d 243, 245* (luring victims to motel by asking them to babysit his kids, then sexually assaulting them established common scheme); *State v. Jensen (1969), 153 Mont. 233, 238-39, 455 P.2d 631, 634* (testimony of twelve other witnesses concerning sexual advances of defendant was properly admitted because it established three year continuous pattern in which [**411] chiropractor sexually assaulted patients in his office); *see also State v. Powers (1982), 198 Mont. 289, 299, 645 P.2d 1357, 1363* (unusually harsh discipline [***653] by other church members against other children is admissible to show common design of punishment policy of the church); *State v. Riley* (1982), 1 *199 Mont. 413, 426, 649 P.2d 1273, 1280.*

[*P21] This "distinctive methods" application of the common scheme or plan definition is essentially the same as the test we articulated under *Sweeney* for the admission of other crimes to prove identity. *Sweeney, 299 Mt 111, 31* ("other crime or act must be sufficiently distinctive to warrant an inference that the person who committed the act also committed the offense at issue.")

[*P22] In other cases discussing common scheme, we have held that similarity between the prior crime and the alleged crime on trial is sufficient for admissibility, especially in the context of sex crimes. *State v. Tecca (1986), 220 Mont. 168, 173, 714 P.2d 136, 139* (nine years of continuous molestation of various minor girls in the same household, which ceased only during the years defendant was away in the military, was evidence of common scheme and therefore admissible at trial involving only one of the victims); *State v. Wurtz (1981), 195 Mont. 226, 236, 636 P.2d 246, 251* (driving by women and calling obscenities and threats to them showed a common scheme to achieve intended result of intimidation) *overruled on other grounds by State v. Lance (1986), 222 Mont. 92, 721 P.2d 1258*; *State v. Eiler (1988), 234 Mont. 38, 50, 762 P.2d 210, 217-18* (common scheme shown by tendency to have sexual interest in and parental control over young girls; prior act of defendant against previous stepdaughter was held admissible); ***State v. Gambrel (1990), 246 Mont. 84, 90, 803 P.2d 1071, 1075*** (prior acts of defendant against three other live-in partners over four years showed that after he had been drinking, his course of conduct included death threats, sexual assaults and beatings, which showed a common scheme with murder of victim in case at trial); *State v. Long (1986), 223 Mont. 502, 507, 726 P.2d 1364, 1367* (due to subtle nature of child abuse, evidence of prior act of rubbing minor's bottom is similar enough to alleged acts of pulling down pants of other minors and touching their vaginas to justify its admission as common scheme); *see also cases with similar facts where common scheme was not discussed;* ***State v. McKnight (1991), 250 Mont. 457, 463-64, 820 P.2d 1279, 1283*** (although defendant asserted merely similar acts of sexual advances on other children could not constitute common scheme, Court did not discuss common scheme and held prior acts were admissible as evidence of motive or intent prior to the holding in *Sweeney*); ***Whitlow,*** [**412] ***285 Mont. 430, 949 P.2d 239,*** *949 P.2d 239*; *Sweeney 299 Mt 111, 7, 15*; *State v. Crist (1992), 253 Mont. 442, 446, 833 P.2d 1052, 1055.*

[*P23] In contrast, we have also held that mere similarity is insufficient to show common scheme. See *Rogers, 297 Mt 188, 41* (defendant's acts of sexual aggression following barroom encounters are dictated by his character and the situation at hand; they do not reflect a systematic plan); *State v. Hansen (1980), 187 Mont. 91,*

98, 608 P.2d 1083, 1087 (barroom pickups, powered by the urge, and consummated in automobiles, are too common to show scheme); *State v. Sauter (1951), 125 Mont. 109, 112, 232 P.2d 731, 732*; *State v. Adams (1980), 190 Mont. 233, 236, 620 P.2d 856, 858* (two similar thefts of coins from jukeboxes were not part of a common scheme because the offenses were linked by similarity and nothing more).

[*P24] As part of this discussion, it is worth noting that prior to our adoption of the current *Just/Matt* rule, we addressed other crimes evidence in the context of common scheme or plan in *State v. Merritt (1960), 138 Mont. 546, 357 P.2d 683*. In that case, we stated:

Thus in 22 C.J.S. Criminal Law § 688, p. 1109, et seq., it is said: " As a general rule, evidence of other crimes than that charged is competent when it tends to establish a common scheme, plan, system, design, or course of conduct, at least where such other crimes are similar to, and closely connected with, the one charged, and were committed at about the same time or at a time not too remote. Another statement is that evidence of other crimes is admissible to prove the crime charged when it tends to establish a common scheme or plan embracing the commission of two or more [***654] crimes so related that proof of one tends to establish the other or others."

Merritt, 138 Mont. at 548-49, 357 P.2d at 684.

[*P25] This discussion illustrates that the first two elements of the modified *Just* rule--i.e., similarity of crimes and nearness in time between the crimes--were, prior to the adoption of our current rule, considered part and parcel of the determination of whether a common scheme existed. In other words, in the context of determining whether there existed a common scheme or plan for the purpose of other crimes evidence prior to the adoption of Rule 404(b), it was necessary to consider similarity and nearness in time together rather than as independent elements. *See Jensen, 153 Mont. at 239, 455 P.2d at 634* (citing *Merritt*). *Merritt* has never been overruled and remains good law.

[*P26] While remoteness in time is a separate prong under the current [**413] modified *Just* rule, *Merritt* demonstrates that where common scheme or plan is at issue, it is necessary to consider the similarity of crimes and nearness in time between the crimes as part and parcel of the analysis. Indeed, for Rule 404(b) purposes we conclude that proof of mere similarity of crimes is insufficient, on a stand alone basis, to demonstrate a "common purpose or plan that results in the repeated commission of the same offense." Rather, application of this definition of common scheme also requires showing that the crimes occurred within a time frame that supports the conclusion that the similar offenses were committed to achieve a common purpose or plan related to the commission of the current charge. To conclude otherwise would allow a common scheme to be proven by the simple expedient of aggregating similar criminal acts without regard to the time frame within which those acts occurred and without regard to whether those acts were actually part of a common purpose or plan to commit the offense at issue. In short, the limited purpose for allowing common scheme evidence under Rule 404(b) would be effectively nullified.

[*P27] Indeed, we have previously considered the time element crucial to common scheme analysis. For example, we held that writing almost 200 bad checks over a period of a year and half constituted common scheme in part because " acts which closely follow one another evidence a continuing criminal design." *State v. Fleming (1987), 225 Mont. 48, 51, 730 P.2d 1178, 1180*; *see also State v. McHugh (1985), 215 Mont. 296, 301, 697 P.2d 466, 470.*

[*P28] Furthermore, considering nearness in time as a part of common scheme is consistent with the overall purpose of Rule 404, M.R.Evid.--to prevent the admission of other crimes simply to show a defendant's character and action in conformity with that character. *See* ***State v. Ray (1994), 267 Mont. 128, 132-34, 882 P.2d 1013, 1015-16*** (prior sexual assault 16 years earlier was too remote to the charged conduct and consequently unjustly prejudicial to defendant).

[*P29] Notwithstanding that the cases cited in 22 did not factor time frame analysis into common scheme or plan, we now make that a requirement in this and future cases.

[*P30] Turning then to the case at bar, here the District Court found that the other crimes evidence was not too remote in time under the second prong of the *Just* rule because Aakre supposedly did not have an opportunity between his two marriages to sexually assault a stepchild. We disagree with the trial court's determination in the following respect. We conclude that the 16 year time span between Aakre's prior acts and the offenses on trial were simply too remote to [**414] constitute a common scheme or plan such that Aakre's acts resulted in the "repeated commission of the same offense." There was no demonstration by the State that Aakre's conduct 16 years ago was committed as part of a common purpose or plan to commit the charged offenses. Aakre's conduct then and now may be similar, but that, on a stand alone basis, does not prove a common scheme or plan in the legal sense where 16 years separates the prior acts from the current charges.

[*P31] Like the arguments in *Sweeney,* the State's argument here boils down to one that Aakre is a sexual predator and that Aakre's acts of sexual aggression are

dictated by his character and the situation at hand. That [***655] may well be true, but Rule 404(a) requires that Aakre be convicted of the crimes with which he is charged on the basis of evidence that proves more than simply his bad character. More to the point, on the facts here, Rule 404(b), specifically common scheme or plan, does not provide the exception to Rule 404(a) which the State seeks. [2]

> 2 We note, as we did in *Sweeney,* P36, that the federal exceptions to the other crimes rule for sex crimes have not been enacted in Montana. *See Rule 413, Fed. R. Evid.*, ("In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible"); Rile *414 Fed. R. Evid.*, ("In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible"). If there is to be an automatic exception to Rule 404(b), M.R.Evid., in Montana regarding sex crimes, than it is appropriate for the Legislature to address this issue.

[*P32] Finally, in the majority opinion in *In re C.R.O., 2002 MT 50, 309 Mont. 48, 43 P.3d 913*, the author, Justice Rice, makes an observation that is applicable to his dissent in the case at bar: "The dissent[] offers arguments which tug at the heart, but misses the law."; *C.R.O., 309 Mt 48, 23.*

[*P33] The dissent contends that the majority has not cited authority for equating the terms "plan" and "common scheme." Paragraphs 14 and 15 of the Court's opinion do precisely that. To the contrary, it is the dissent that fails to provide authority for the conclusion that "'plan' is different and narrower than 'common scheme.'"

[*P34] Furthermore, rather than emasculating Rule 404(b) as the dissent suggests (again without analysis or reference to any particular cases), *Sweeney* and our Opinion here attempt to honor the plain language and intended historical purposes of the Rule. These purposes include protecting the presumption of innocence; limiting the trial evidence to the act alleged; fostering efficiency at trial by avoiding mini-trials on [**415] the uncharged conduct, *see* Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG . 181, 185-86; and, preventing the admission of uncharged conduct as circumstantial proof of charged conduct except where the uncharged conduct possesses "independent" or "special" probative value relevant to a non-character theory. Imwinkelried, at 1007. More simply, read together, Rules 404(a) and (b) prohibit "the prosecutor from urging the jury to reason simplistically, 'He did it once; therefore, he did it again.'"Imwinkelried, at 1006.

[*P35] Worse, the dissent's preference for enlarging the use of other crimes evidence under the guise of "plan" runs directly counter to the "Rule's intended purpose and historical application" that the dissent seemingly seeks to preserve. As noted by Professors Mendez and Imwinkelried:

> In recent years, the plan doctrine has proven to be one of the most controversial theories for admitting uncharged misconduct. Some critics have charged that by irresponsibly invoking the theory without careful analysis, many courts have converted plan into a "euphemism" for bad character, and have allowed the theory to degenerate into "a dumping ground" for inadmissible bad character evidence.

Miguel A. Mendez and Edward J. Imwinkelried, *People v. Ewoldt: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct, 28 L OY. L.A. L. R EV. 473, 478-79.*

[*P36] There is no legitimate reason for this Court to travel a similar route, as suggested by the dissent. If other crimes, wrongs or acts are to be admitted as proof of the common scheme or plan at issue, then the prosecution bears the burden of establishing that the prior crimes, wrongs or acts were, in fact, part and parcel of the accused's common purpose or plan to commit the current charge. Put another way, the government must prove that the prior crimes, wrongs or acts and the charged offense are linked as integral components of the defendant's common purpose or plan to commit the current charge.

[*P37] Indeed, to hold otherwise allows the "plan" exception of Rule 404(b) to swallow the general rule expressed in Rule 404(a) and exposes the accused to the very real likelihood that the jury will determine guilt, not [***656] on the basis of the State's evidence of the current offense, but, rather, on the basis of the jury's belief that the defendant's past character is an accurate predictor of his present conduct. This, historically, was precisely what Rule 404(b) was [**416] adopted to prevent.

[*P38] We hold the District Court did not abuse its discretion in granting Aakre's motion for a new trial and, accordingly, affirm as to this issue.

B. Absence of Mistake or Accident

[*P39] The State also asserts on appeal that Aakre's prior acts were properly admitted under the *Just* rule as evidence of absence of mistake or accident. We disagree.

[*P40] In its opening brief the State points to the fact that Aakre presented evidence that Alice Violet "Vi" Aakre (Violet), i.e. Aakre's wife and A.S.'s grandmother, believed that on one occasion Aakre properly touched A.S., at her request, in order to check for possible bruising from abuse from another person. The State maintains that, with this evidence, "Aakre put his knowledge and intent at issue by explaining that the touching was for a reason other than his sexual gratification, and the other acts evidence was relevant and admissible, under Rule 404(b) and *State v. Whitlow (1997), 285 Mont. 430, 949 P.2d 239*, to show the absence of mistake or accident." Aakre argues that he was forced to put on this evidence by the erroneous ruling of the trial court admitting his prior crimes.

[*P41] In its reply brief, the State concedes that while Aakre did not testify " and therefore did not claim to have committed the charged acts mistakenly or accidentally" the evidence of the 1996 incident testified to by Violet did raise the issue of mistake or accident.

[*P42] Our review leaves us unpersuaded by the State's arguments. As the State concedes, Aakre did not try to use the defense of mistake or accident as regards the commission of the current charges. Aside from concluding, without analysis, that the grandmother's testimony placed absence of mistake or accident at issue, the State does not further develop this argument or relate it to any case law. *See* Rule 23(a)(4), M.R.App.P. Moreover, the State's citation to *Whitlow, 285 Mont. 430, 949 P.2d 239*, is not helpful. The other crimes evidence on the issue of absence of mistake or accident in that case went directly to a defense which Whitlow himself raised. *Whitlow, 285 Mont. at 440, 949 P.2d at 245-46.*

[*P43] As we noted above, *Sweeney* requires that each purpose for which evidence is offered be at issue and be independently analyzed. It is well settled that the trial court's decision is presumed correct and that the appellant bears the burden of establishing error. *In re M.J.W.,1998 MT 142, P18, 289 Mont. 232, P18, 961 P.2d 105, P18.* Here, there was no issue that Aakre mistakenly or accidentally [**417] touched A.S. as regards the current charges offense, and we have not been presented with any persuasive analysis or citation to authority leading us to conclude that the District Court erred. As we did on the issue of common scheme and plan, we affirm the trial court's determination not to allow other crimes evidence for purposes of proving absence of mistake or accident.

[*P44] Affirmed.

JAMES C. NELSON

We Concur:

TERRY N. TRIEWEILER

PATRICIA COTTER

W. WILLIAM LEAPHART

DISSENT BY: JIM RICE

DISSENT

Justice Jim Rice dissenting.

[*P45] I dissent.

[*P46] In this decision, the Court continues its deliberate emaciation of Rule 404(b), Mont.R.Evid. There is little that remains of the Rule. Further, without saying so, the Court overrules many virtually indistinguishable cases, such as *State v. Eiler (1988), 234 Mont. 38, 762 P.2d 210*, in which the Court validated the kind of evidence offered here.

[*P47] The Court completely removes "plan" from Rule 404(b). There is no further need for the word to exist within the Rule, because its particular meaning has been deleted. Despite the Rule's specific mention of the word, the Court, finding the word used within the definition of "common scheme" found at *§ 45-2-101(7), MCA*, eliminates the independent meaning of "plan," holding in [*P16] that "plan" is identical with, and has been subsumed by, the term "common scheme." To [***657] the contrary, these terms are not synonymous. "Plan" is different and narrower than "common scheme." The word as used within Rule 404(b) authorizes introduction of other crimes or wrongs for the purpose of establishing an actor's preparation, design or motive. The Rule does not require proof of a "series of acts" which is implicated within a "common scheme."

[*P48] The Court then further narrows Rule 404(b) by grafting the statutory definition of common scheme within the Rule itself:

For Rule 404(b) purposes we conclude that proof of mere similarity of crimes is insufficient, on a stand alone basis, to demonstrate a "common purpose or plan that results in the repeated commission of the same offense." Rather, application of this [statutory] definition of common scheme also requires showing that the crimes occurred within a time frame that supports the conclusion that the similar offenses were committed to achieve a common purpose or plan related to the commission of the current charges. [26]

Thus, the Court now requires that Rule 404(b) evidence establishing [**418] "plan" must consist of: similar offenses -- committed near in time -- for the purpose of achieving a common scheme (see statutory definition in *§ 45-2-101(7), MCA)* -- that was specifically "related to the commission of the current charge." *See* 26. Regrettably, the Court has restricted the application of Rule

404(b) to a very limited set of circumstances that bears little relation to the Rule's intended purpose and historical application. The Court offers no authority which mandates such a holding, nor any reason to eradicate the simple concept of "plan" from the law, only satisfying its continuing desire to eliminate the introduction of similar evidence in criminal cases as a matter of policy preference, evident by its ever-increasing constriction of the Rule.

[*P49] The sexual crime committed against the young girl by the defendant in this case was remarkably similar to the defendant's previous violation of another young girl, similar in age, within similar family relations, in a similar location of the house, with a similar tactic to isolate the girl, involving similar sexual actions, engaging in a similar long term pattern of sexual abuse of the child, during the next consecutive marital period of the defendant. For this Court, however, that is not similar enough.

[*P50] If I were intent on changing the Rule to reflect a policy preference, I would first consider the enormous challenge faced by a young, vulnerable, abused child who must carry the evidentiary load for the State in what is often a "my word against yours" trial against a manipulative defendant who held a position of trust over the child. After that child has borne the burdens which our system must necessarily place upon her to testify against the defendant, and in the face of the defendant's denial of the charge, I would allow the State to introduce evidence of a defendant's extremely similar abuse of another child to demonstrate the very specific plan he also used to abuse this child, as well as to demonstrate his motive for the crime, and his knowledge of his crime, an element the State must prove. In so allowing, a legitimate public policy would be served, and further, the intended purpose of Rule 404(b) would be fulfilled.

[*P51] I would reverse the District Court and affirm the jury's verdict convicting the defendant herein.

JIM RICE

LEXSEE 260 F.3D 1018

Caution
As of: Jan 23, 2009

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRED JAMES LEMAY, III, Defendant-Appellant.

No. 00-30193

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

260 F.3d 1018*; *2001 U.S. App. LEXIS 17866*; *56 Fed. R. Evid. Serv. (Callaghan) 1193*; *2001 Cal. Daily Op. Service 6861*; *2001 Daily Journal DAR 8449

April 5, 2001, Argued and Submitted, Seattle, Washington
August 9, 2001, Filed

SUBSEQUENT HISTORY: [**1] Certiorari Denied February 25, 2002, Reported at: *2002 U.S. LEXIS 1252*.
Writ of certiorari denied *LeMay v. United States, 534 U.S. 1166, 122 S. Ct. 1181, 152 L. Ed. 2d 124, 2002 U.S. LEXIS 1252 (2002)*
Post-conviction relief denied at *United States v. Lemay, 2005 U.S. App. LEXIS 24814 (9th Cir. Mont., Nov. 15, 2005)*

PRIOR HISTORY: Appeal from the United States District Court for the District of Montana. D.C. No. CR-99-00116-DWM. Donald W. Molloy, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: John P. Rhodes, Federal Defenders of Montana, Missoula, Montana, for the defendant-appellant.

Marcia Good Sept (Briefed), United States Attorney's Office, Billings, Montana, for the plaintiff-appellee.

Lisa Simotas (Argued), United States Attorney's Office, Billings, Montana, for the plaintiff-appellee.

JUDGES: Before: Harlington Wood, Jr., * Stephen S. Trott, and Richard A. Paez, Circuit Judges. Opinion by Judge Trott; Partial Concurrence and Partial Dissent by Judge Paez.

* The Honorable Harlington Wood, Jr., Senior Circuit Judge for the Seventh Circuit, sitting by designation.

OPINION BY: Stephen S. Trott

OPINION

[*1022] TROTT, Circuit Judge:

Fred LeMay appeals his convictions for two counts of child molestation in violation of *18 U.S.C. §§ 2241* and *3231*. We must decide whether admission of his prior acts of child molestation under *Rule 414 of the Federal Rules of Evidence* violated his constitutional right to due process. We agree with numerous other courts that *Rule 403* remains applicable [**2] to evidence introduced under *Rule 414*, and, if conscientiously applied, will protect defendants from propensity evidence so inflammatory as to jeopardize their right to a fair trial. We therefore conclude that *Rule 414* is constitutional.

In so holding, we emphasize that *Rule 414* is not a blank check entitling the government to introduce whatever evidence it wishes, no matter how minimally relevant and potentially devastating to the defendant. We also emphasize that district courts must apply the balancing test of *Rule 403* in a manner that allows for meaningful appellate review. We conclude that the district judge in this case applied *Rule 403* conscientiously and did not abuse his discretion in finding that LeMay's prior acts of child molestation were not so prejudicial as to outweigh their probative value. Thus, we can find no constitutional

error or abuses of discretion. We therefore AFFIRM LeMay's convictions.

BACKGROUND

Fred LeMay is a twenty-four-year-old Native American and a member of the Fort Peck Indian tribe. The charges in this case arose from an incident that occurred during the summer of 1997 in Poplar, Montana, on the Fort Peck Indian Reservation. LeMay lived [**3] on the Fort Peck Reservation from 1991 to 1998, and intermittently resided at the home of his sister, Justine Shields, and her husband, Daniel Renz. Shields and Renz had several young children, for whom LeMay often babysat. One such instance occurred during the summer of 1997. Shields and Renz had gone out for the evening, leaving LeMay to watch their children D.R. and A.R., two boys ages five and seven.

LeMay made both children orally copulate with him while their parents were away and threatened to beat them up if they told anyone. Undeterred, the boys informed their mother of the abuse the next morning. Although Shields refused to let LeMay babysit for her children after that, she did not report the incident, look for evidence, or take the boys to a doctor or a counselor. Two years later, however, law enforcement authorities got wind of LeMay's abuse of the children and investigated the allegations. LeMay was eventually arrested and charged with child molestation.

Before trial, the prosecutor gave notice of her intent to introduce evidence of LeMay's prior acts of sexual misconduct under *Rule 414 of the Federal Rules of Evidence.* The evidence consisted of a juvenile rape conviction [**4] arising from events that had occurred in 1989, when LeMay was just twelve years old. At that time, LeMay resided with his aunt, Francine LeMay, in Gresham, Oregon. Francine LeMay had two daughters, who in the summer of 1989 were two years and eight months old, respectively.

[*1023] As in the 1997 incident for which LeMay was charged, LeMay sexually abused the children while babysitting for them. Francine LeMay returned from the grocery store to find her two-year old daughter upset and bruised. Upon confrontation, Francine LeMay extracted an admission from LeMay that he had "put his penis in" the older child's mouth. Francine LeMay also found a cream-like substance in her infant's vagina when she changed her diaper, and implied that this substance was semen. In a subsequent juvenile adjudication, LeMay was found guilty of rape.

LeMay opposed the prosecution's attempt to introduce this evidence, mounting both a facial and an "as-applied" challenge to the constitutionality of *Rule 414.* He also claimed that the evidence was not admissible under *Rule 403*, arguing that its potential for prejudice far outweighed its probative value. After an extensive pretrial hearing, the district judge rejected [**5] LeMay's facial constitutional challenge. The judge reserved the "as applied" and *Rule 403* challenges until trial, in order to be able to determine more accurately whether the prosecution's proffered evidence would be relevant. The judge observed that "[a] full evaluation of all the evidence and the appropriate balancing test to be applied in this case is best left for trial."

At trial, the prosecution called both A.R. and D.R., who by that time were seven and nine years old. Both boys remembered the incidents and testified consistently. The prosecution also called the boys' mother, Justine Shields. Because Shields had not informed anyone that LeMay had molested her children, the prosecution was unable to offer any forensic, medical, or psychological evidence that the boys had been abused, and the case therefore rested on their testimony.

LeMay took advantage of this lack of evidence in his opening statement, arguing that no eyewitnesses or medical or scientific experts would corroborate the testimony of A.R. and D.R. Further, in cross-examining the boys, LeMay's counsel attempted to call into question their ability to remember events accurately. He also suggested that the boys [**6] might have a motive to lie because they were currently in foster care, and that they might have thought that accusing LeMay of molesting them would be a way to be reunited with their parents.

After A.R., D.R., Shields, and the investigator testified, the judge decided the remaining *Rule 414* issues. He determined that *Rule 403* did not otherwise preclude the introduction of the prior acts of molestation, and that *Rule 414* was not unconstitutional as applied to LeMay. In conducting the *Rule 403* balancing test, the judge stated:

> On examination of each of the boys in question, there [have] been substantial issues raised concerning their credibility ....
>
> There's a substantial issue that goes to the credibility of all of the persons involved in the care of these children.
>
> And I find that the evidence proffered by the government is relevant to issues of credibility. It is also relevant in rebutting the suggestion that there's no proof that this happened, which was made by the defendant in his opening statement, and that there would be no witnesses, medical, psychological, or eyewitnesses called. And, consequently, I am going to admit

> the evidence over the objection of [**7] the defendant.

Before allowing the prosecution to present its prior act evidence, however, the judge gave the jury the following limiting instruction:

> [*1024] You are going to hear testimony from this witness and this testimony has a limited purpose. The limited purpose is as it may bear on the credibility of witnesses from whom you have already heard testimony. The evidence you are about to hear is not evidence of guilt in this case of the defendant, per se, it is evidence that can be considered by you for any purpose to which it is relevant in terms of the issues in this case.

After this instruction, the prosecutor called her last two witnesses. She first called Francine LeMay, who testified about the defendant's abuse of her children in Oregon in 1989. Ms. LeMay, who began her testimony in tears, described generally how she had discovered that LeMay had abused her daughters and how she had gotten him to admit to that abuse. The prosecution's final witness established that LeMay had been found guilty of rape in a juvenile adjudication. After these witnesses, the prosecution closed its case.

When both sides had rested, the district court reminded the jury that LeMay [**8] was on trial for the acts charged in the indictment, and not for the acts of molestation that occurred in 1989. Over LeMay's objection, the judge instructed that "the defendant is not on trial for any conduct or offense that is not charged in the indictment. You should consider any evidence about other acts of the defendant that you have heard ... only as those acts may bear on the matter that is relevant in this case."

The jury found LeMay guilty of both counts of molestation, and the district judge sentenced him to 405 months in prison.

DISCUSSION

A. Standard of Review

We review *de novo* a claim that a statute or a rule is unconstitutional. *See, e.g., United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999)*. However, a district judge's ruling under *Rule 403* that evidence is more probative than prejudicial is reviewed for an abuse of discretion. *See, e.g., United States v. Leon-Reyes, 177 F.3d 816, 821 (9th Cir. 1999)*.

B. Due Process

Prior to 1994, when *Rules 413 through 415* were passed, admission of a defendant's prior crimes or acts was governed by *Rule 404(b)*, which disallows such evidence when used to prove [**9] "the character of a person in order to show action in conformity therewith." *FED. R. EVID. 404(b)*. *Rule 414* changes this general rule with respect to child molestation cases. It makes such evidence admissible, providing that:

> In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

FED. R. EVID. 414(a). LeMay contends that *Rule 414* violates due process principles by removing the long-standing ban on propensity evidence in criminal trials. He argues that the traditional rule precluding the use of a defendant's prior bad acts to prove his disposition to commit the type of crime charged is so ingrained in Anglo-American jurisprudence as to be embodied in the due process clause of the Constitution. LeMay has a very high burden in proving this assertion, and we conclude he has not met it.

1. Applicable Law

The Constitution does not encompass all traditional legal rules and customs, no matter how longstanding and widespread such practices may be. The Supreme [**10] Court has cautioned against the [*1025] wholesale importation of common law and evidentiary rules into the Due Process Clause of Constitution. In *Dowling v. United States*, for example, the Court held that a rule or practice must be a matter of "fundamental fairness" before it may be said to be of constitutional magnitude. *493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)*. The Court stated:

> Beyond the specific guarantees enumerated in the *Bill of Rights*, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness" very narrowly. ... Judges are not free, in defining due process, to impose on law enforcement officials their personal and

> private notions of fairness and to disregard the limits that bind judges in their judicial function. They are to determine only whether the action complained of violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency.

Id. (internal quotations and citations omitted). Additionally, "it is not the State which bears the burden of demonstrating that its rule [**11] is 'deeply rooted, 'but rather[the defendant]." *Montana v. Egelhoff, 518 U.S. 37, 47, 135 L. Ed. 2d 361, 116 S. Ct. 2013 (1996)* (plurality opinion). Thus, we must decide if LeMay has shown that the traditional ban on propensity evidence involves a "fundamental conception of justice." *Id.* We conclude he has not.

2. Historical Evidence

The Supreme Court has held that the primary guide for determining whether a rule is so "fundamental "as to be embodied in the Constitution is historical practice. *See Egelhoff, 518 U.S. at 43.* In this case, however, evidence of historical practice does not lead to a clear conclusion. On the one hand, it seems clear that the general ban on propensity evidence has the requisite historical pedigree to qualify for constitutional status. *See, e.g., McKinney v. Rees, 993 F.2d 1378, 1384-85 (9th Cir. 1993)* (holding in the context of a murder prosecution that "the character rule is based on ... a 'fundamental conception of justice' and the 'community's sense of fair play and decency'"); *Old Chief v. United States, 519 U.S. 172, 182, 136 L. Ed. 2d 574, 117 S. Ct. 644 (1997)* (stating [**12] in dicta that "there is ... no question that propensity would be an 'improper basis' for conviction"); *Michelson v. United States, 335 U.S. 469, 475-76, 93 L. Ed. 168, 69 S. Ct. 213 (1948)* (noting in dicta that "courts that follow the commonlaw tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt").

On the other hand, courts have routinely allowed propensity evidence in sex-offense cases, even while disallowing it in other criminal prosecutions. In many American jurisdictions, evidence of a defendant's prior acts of sexual misconduct is commonly admitted in prosecutions for offenses such as rape, incest, adultery, and child molestation. *See, e.g.*, 2 JOHN H. WIGMORE, WIGMORE ON EVIDENCE, §§ 398-402. As early as 1858, the Michigan Supreme Court noted that" courts in several of the States have shown a disposition to relax the rule [against propensity evidence] in cases where the offense consists of illicit intercourse between the sexes. " *People v. Jenness, 5 Mich. 305, 319-20, 1858 WL 2321* at *8 (Mich. 1858). Today, state [**13] courts that do not have evidentiary rules comparable to Federal *Rules 414 through 415* allow this evidence either by stretching traditional 404(b) exceptions to the ban on character evidence or by resorting to the so-called "lustful disposition" exception, which, in its purest form, is a rule allowing for propensity inferences in sex [*1026] crime cases. *See, e.g.*, Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 188 (1993). Thus, "the history of evidentiary rules regarding a criminal defendant's sexual propensities is ambiguous at best, particularly with regard to sexual abuse of children." *United States v. Castillo, 140 F.3d 874, 881 (10th Cir. 1998).*

3. Rule 403

The historical evidence in this case thus leads to no clear conclusion. In holding that *Rule 414* is constitutional, we therefore do not rely solely on the fact that courts have historically allowed propensity evidence to reach the jury in sex offense cases. Because LeMay has the burden of proving that the ban on propensity evidence is a matter of fundamental fairness, the divergence in historical evidence [**14] does cut against his position. *See Egelhoff, 518 U.S. at 47.* Yet while we recognize the importance of historical practice in determining whether an evidentiary rule is embodied in the Due Process Clause, in this case, we find it necessary to conduct an independent inquiry into whether allowing propensity inferences violates fundamental ideas of fairness.

We conclude that there is nothing fundamentally unfair about the allowance of propensity evidence under *Rule 414.* As long as the protections of *Rule 403* remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded.

Although this court has never squarely addressed the issue of whether *Rule 414* and its companion rules are constitutional, we have recently held that the balancing test of *Rule 403* continues to apply to those rules, and that district judges retain the discretion to exclude evidence that is far more prejudicial than probative. *See Doe by Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000)* (rejecting claim that *Rule 415*, which allows for introduction of prior sexual misconduct [**15] in civil sexual assault or child molestation cases, eliminates balancing protections of *Rule 403*).

With the protections of the *Rule 403* balancing test still in place, LeMay's due-process challenge to *Rule 414*

loses much of its force. The evidence that he had sexually molested his cousins in 1989 was indisputably relevant to the issue of whether he had done the same thing to his nephews in 1997. *See, e.g., Michelson, 335 U.S. at 475* (noting that defendant's prior crimes or ill name "might logically be persuasive that he is by propensity a probable perpetrator of the crime"). The introduction of relevant evidence, by itself, cannot amount to a constitutional violation.

Likewise, the admission of prejudicial evidence, without more, cannot be unconstitutional. All evidence introduced against a criminal defendant might be said to be prejudicial if it tends to prove the prosecution's case. Moreover, evidence that a defendant has committed similar crimes in the past is routinely admitted in criminal prosecutions under *Rule 404(b)* to prove preparation, identity, intent, motive, absence of mistake or accident, and for a variety of other purposes. *FED. R. EVID. 404(b).*

[**16] The introduction of such evidence can amount to a constitutional violation only if its prejudicial effect far outweighs its probative value. In *McKinney*, we granted a writ of habeas corpus and overturned a murder conviction where the petitioner's trial had been infused with highly inflammatory evidence of almost no relevance. *See McKinney, 993 F.2d at 1384-85.* LeMay, of course, emphasizes [*1027] that *McKinney* held that the ban on propensity evidence is of constitutional magnitude. What he misses, however, is the fact that we held that such evidence will only *sometimes* violate the constitutional right to a fair trial, if it is of no relevance, or if its potential for prejudice far outweighs what little relevance it might have. Potentially devastating evidence of little or no relevance would have to be excluded under *Rule 403*. Indeed, this is exactly what *Rule 403* was designed to do. We therefore conclude that as long as the protections of *Rule 403* remain in place so that district judges retain the authority to exclude potentially devastating evidence, *Rule 414* is constitutional.

Several courts have reached the same conclusion. In *Castillo*, for example, the [**17] Tenth Circuit noted that "application of *Rule 403* ... should always result in the exclusion of evidence" that is so prejudicial as to deprive the defendant of his right to a fair trial, and that "application of *Rule 403* to *Rule 414* evidence eliminates the due process concerns posed by *Rule 414*." *140 F.3d at 883*. Applying nearly identical reasoning, the Tenth Circuit has also affirmed the constitutionality of *Rule 413*, which allows for propensity inferences in rape and sexual assault cases. *See United States v. Enjady, 134 F.3d 1427, 1430-35 (10th Cir. 1998)*. Other courts have agreed. *See, e.g., United States v. Mound, 149 F.3d 799, 800-802 (8th Cir. 1998)* (concluding that *Rule 413* passes constitutional muster if *Rule 403* protections remain in place); *United States v. Wright, 53 M.J. 476 (C.A.A.F. 2000)* (same); *Kerr v. Caspari, 956 F.2d 788, 790 (8th Cir. 1992)* (holding that a Missouri rule allowing for propensity inferences in sex crime prosecutions is constitutional as long as *Rule 403* test is applied).

We join these courts in holding that *Rule 414* does not violate the Due Process Clause of the constitution. [**18] The admission of relevant evidence, by itself, cannot amount to a constitutional violation. Nor does the admission of even highly prejudicial evidence necessarily trespass on a defendant's constitutional rights. Thus, the claim that *Rule 414* is unconstitutional can be reduced to a very narrow question: "whether admission of ... evidence that is both relevant under Rule 402 and not overly prejudicial under 403 may still be said to violate the defendant's due process right to a fundamentally fair trial." *Castillo, 140 F.3d at 882*. As the *Castillo* court noted, "to ask that question is to answer it. "*Rule 414* is constitutional on its face.

C. *Rule 403*

LeMay also argues that even if *Rule 414* is facially constitutional, it is unconstitutional as applied to him, and that the district judge abused his discretion in admitting the evidence under *Rule 403*. If the prior acts of molestation were properly admitted under *Rule 403*, there can have been no as-applied constitutional violation. *Castillo, 140 F.3d at 882*. We therefore first address whether admitting the evidence was an abuse of discretion. We conclude that it was not.

Rule 403 provides that [**19] relevant evidence may be excluded, among other reasons, if "its probative value is substantially outweighed by the danger of unfair prejudice." *FED. R. EVID. 403*. In *Glanzer*, we stated that "because of the inherent strength of the evidence that is covered by [*Rule 414*], when putting this type of evidence through the [*Rule 403*] microscope, a court should pay 'careful attention to both the significant probative value and the strong prejudicial qualities' of that evidence." *Glanzer, 232 F.3d at 1268* (quoting *United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998))*. We also articulated several factors that district judges must evaluate in determining [*1028] whether to admit evidence of a defendant's prior acts of sexual misconduct. These factors are: (1) "the similarity of the prior acts to the acts charged, "(2) the "closeness in time of the prior acts to the acts charged, "(3) "the frequency of the prior acts," (4) the "presence or lack of intervening circumstances," and (5) "the necessity of the evidence beyond the testimonies already offered at trial." *Id.* We also stated that this list of factors is not exclusive, and that district judges [**20] should consider other factors relevant to individual cases. *Id.*

We had not decided *Glanzer* at the time of LeMay's trial and so the district judge did not explicitly consider each of the factors we articulated there in making his 403 ruling. However, the district judge did conduct just the sort of searching inquiry we deemed necessary in *Glanzer*. He held an extensive pre-trial hearing, at which he grilled the prosecutor about all aspects of *Rule 414*, and questioned her as to why she needed the prior acts evidence and how she intended to introduce it. The judge also reserved the *Rule 403* decision until after the prosecution had introduced all its other evidence, in order to get a feel for the evidence as it developed at trial before ruling on whether LeMay's prior acts of child molestation could come in. After hearing the opening statements and the prosecutor's case, the judge concluded that the prior molestations were relevant to bolster the credibility of D.R. and A.R., and to rebut the suggestion that there was no evidence to corroborate their testimony. Finally, the district court reminded the jury in its final instructions that, while it could consider the prior acts [**21] evidence for any matter which it deemed relevant, it could only convict LeMay for the charged crimes. In short, although the district judge did not discuss the specific factors we deemed relevant in *Glanzer*, the record reveals that he exercised his discretion to admit the evidence in a careful and judicious manner.

We also conclude that admitting LeMay's prior acts of molestation was proper in light of the factors we discussed in *Glanzer* and others relevant to this particular case. We begin by noting, as the district judge did, that the evidence of LeMay's prior acts of child molestation was highly relevant. The 1989 molestations were very similar to the charged crimes. Each case involved forced oral copulation. In each case the victims were young relatives of LeMay, and each instance occurred while LeMay was babysitting them.

Moreover, as the district judge suggested, the prior acts evidence was relevant to bolster the credibility of the victims after LeMay suggested they could be fabricating the accusations. The evidence also countered LeMay's claim that there was no evidence corroborating the testimony of D.R. and A.R.

We recognize that this characterization of the evidence [**22] is essentially a veiled propensity inference. *See, e.g.*, Wright & Graham, 22 FEDERAL PRACTICE AND PROCEDURE § 5248 (noting that use of prior act evidence to "corroborate "testimony of victims is propensity evidence if it "depends upon an inference to the defendant's character"). However, it is also exactly the sort of use of prior acts evidence that Congress had in mind when enacting *Rule 414*. *See* 140 Cong. Rec. H8991-92 (August 21, 1994) (statement of Rep. Molinari) (noting that child molestation cases "require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration"). The case against LeMay rested on testimony of D.R. and A.R. Both children were very young at the time of the incidents, and two years had passed before LeMay was tried. LeMay [*1029] attacked their credibility and suggested that there was not enough evidence to prove their allegations. That this case made use of the prior acts evidence in precisely the manner Congress contemplated strongly indicates that its admission was not an abuse of discretion.

Additionally, the evidence of LeMay's prior abuse of his cousins was also highly reliable. LeMay had been convicted [**23] of at least one of the rape charges arising from the incidents in Oregon. Because LeMay had admitted to abusing his cousins, Francine LeMay's testimony fell within a well-established exception to the hearsay rule. To the extent that allowing the evidence permitted a propensity inference, it was an inference based on proven facts and LeMay's own admissions, not rumor, innuendo, or prior uncharged acts capable of multiple characterizations. Thus, although we do not suggest that district courts may *only* introduce prior acts of molestation for which a defendant has been tried and found guilty, we hold that the extent to which an act has been proved is a factor that district courts may consider in conducting the *Rule 403* inquiry.

We must also consider the remoteness in time of LeMay's prior acts of molestation, the frequency of prior similar acts, and whether any intervening events bear on the relevance of the prior similar acts. *See Glanzer, 232 F.3d at 1268*. The "intervening events" factor seems to have little relevance in the present case, and the other two cut in favor of the government. About eleven years had passed between LeMay's abuse of his nieces and his [**24] trial for the abuse of D.R. and A.R. We have held, in the context of *Rule 404(b)*, that the lapse of twelve years does not render the decision to admit relevant evidence of similar prior acts an abuse of discretion. *See United States v. Rude, 88 F.3d 1538, 1550 (9th Cir. 1996)*. The "frequency of events" factor discussed in *Glanzer* also cuts in favor of the government. Although it was not introduced at trial, the government also had evidence of a third incident in which LeMay had sexually abused his young relatives. True, this incident occurred even before the 1989 abuse of his cousins when LeMay himself was extremely young, and, as the prosecutor noted, was "triple hearsay." However, that there was evidence of a third similar incident suggests that LeMay's abuse of his cousins in 1989 was not an isolated occurrence.

Glanzer also instructs that courts must consider whether the prior acts evidence was necessary to prove the case. This factor also supports the government's position and indicates that the district judge did not abuse his

discretion in admitting the evidence. The prosecution's case rested on the testimony of A.R. and D.R. No other scientific, forensic, [**25] medical, or psychological witness was available. LeMay had attacked the credibility of the boys and capitalized on the lack of eyewitness and expert testimony. That the prosecutor claimed that she could get a conviction without introducing LeMay's prior acts of molestation does not suggest that the evidence was not "necessary." Prior acts evidence need not be *absolutely necessary* to the prosecution's case in order to be introduced; it must simply be helpful or *practically necessary*.

Finally, Francine LeMay's testimony was necessary to establish that LeMay's 1989 molestations were very similar, and thus relevant, to the charged crimes. We reject the idea that the district court should have limited the prosecution to merely proving that LeMay had been convicted of rape eleven years before. The relevance of the prior act evidence was in the details. Establishing the simple fact of conviction would leave out the information that LeMay had been convicted of [*1030] sexually abusing his young relatives, by forced oral copulation, while they were in his care. Francine LeMay's testimony was necessary to fill in the details that made the prior rape conviction relevant. Therefore, the "necessity [**26] "factor favors the government in all respects.

Several factors do admittedly favor LeMay. LeMay himself was only twelve years old at the time of the 1989 molestations. And foremost, of course, is the emotional and highly charged nature of Francine LeMay's testimony. Although we, as an appellate court, are not in a position to evaluate how great an effect Francine LeMay's testimony had on the jury, we do not doubt that it was powerful. Francine LeMay began her testimony in tears, and certainly, her suggestion that LeMay had raped her infant daughter would have been particularly shocking. However, evidence of a defendant's prior acts of molestation will always be emotionally charged and inflammatory, as is the evidence that he committed the charged crimes. Thus, that prior acts evidence is inflammatory is not dispositive in and of itself. Rather, district judges must carefully evaluate the potential inflammatory nature of the proffered testimony, and balance it with that which the jury has already heard, the relevance of the evidence, the necessity of introducing it, and all the other relevant factors discussed above. The record here shows that the district judge did just that. Therefore, [**27] admitting LeMay's prior acts of molestation was not an abuse of discretion.

All in all, the record shows that the district judge struck a careful balance between LeMay's rights and the clear intent of Congress that evidence of prior similar acts be admitted in child molestation prosecutions.

D. Equal Protection

LeMay also argues that *Rule 414* violates his right to equal protection. LeMay proffers various theories to support this claim. We reject these arguments.

First, *Rule 414* does not discriminate against any group of individuals on the basis of a suspect or quasi-suspect class. Sex offenders are not a suspect class. LeMay, however, argues that *Rule 414* has a far greater impact on Native Americans because they are far more likely than members of other races to be prosecuted federally for child molestation. LeMay may be correct that a disproportionately large number of federal child molestation prosecutions involve Indian defendants. But this disproportion, if true, would arise simply because the federal government only has jurisdiction over crimes such as child molestation when they arise on Indian Reservations, military bases, or other federal enclaves. There is no evidence [**28] of any intent on the part of Congress to discriminate against Native Americans, and LeMay's claim therefore is without merit. *See Washington v. Davis, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976).*

LeMay also argues that *Rule 414* violates equal protection principles because it deprives child molesters of a" fundamental right" enjoyed by other criminal defendants. This claim also fails. As discussed above, LeMay has no fundamental right to have a trial free from relevant propensity evidence that is not unduly prejudicial. Although the right to a fair trial may in some instances preclude the introduction of highly inflammatory evidence completely out of proportion to its probative value, *McKinney, 993 F.2d at 1384-86*, *Rule 403* ensures that evidence which is so prejudicial as to jeopardize a defendant's right to a fair trial will be excluded. Thus, the claim that *Rule 414* unfairly impinges on [*1031] sex offenders' fundamental right to a fair trial also fails.

Because *Rule 414* does not burden a fundamental right, and because sex offenders are not a suspect class, *Rule 414* is constitutional if it bears a reasonable relationship to a legitimate governmental [**29] interest. Prosecuting crime effectively is certainly a legitimate governmental interest. *Rule 414* furthers that interest by allowing prosecutors to introduce relevant evidence to help convict sex offenders. LeMay's equal protection arguments are therefore without merit.

E. Remaining Arguments

LeMay also argues that *Rule 414* undermines the presumption of innocence and permits irrational evidentiary inferences. *Rule 414* does neither of these things. To support these contentions, LeMay relies on Supreme Court cases that deal with unconstitutional evidentiary *presumptions .See, e.g., Leary v. United States, 395 U.S.*

6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969). Rule 414 does not create a presumption that a defendant is guilty because he has committed similar acts in the past; it merely allows the jury to consider prior similar acts along with all other relevant evidence. Moreover, although the inference that because a person has done something once, he might be more likely to have done it again has until recently been impermissible, it is certainly not irrational.

LeMay also contends that *Rule 414* violates the "due process reciprocity requirement" because [**30] it would, as he puts it, prevent him "from introducing the exact type of evidence regarding the alleged victim that *Rule 414* permits the Government to introduce against the defendant." Given the age of LeMay's chosen victims, this claim is nonsensical.

Finally, LeMay contends that the rule violates the *Eighth Amendment* ban on cruel and unusual punishment. This argument fails. As the Tenth Circuit stated in *Castillo*, "[*Rule 414*] does not impose criminal punishment at all; it is merely an evidentiary rule. ... For the defendant to be correct [that *Rule 414* punishes one's status as a sex offender] juries would have to ignore courts' instructions to them that they consider only *the crime charged* in deciding whether to convict." *Castillo, 140 F.3d at 884*. The prosecution's other witnesses provided enough evidence that we are convinced that LeMay was not convicted for his status as a sex offender.

CONCLUSION

In sum, we hold that *Rule 414* is constitutional and does not violate due process, equal protection, or any other constitutional guarantee. *Rule 403* adequately safeguards the right to a fair trial. We emphasize, however, that evidence of a defendant's [**31] prior sex crimes will always present the possibility of extreme prejudice, and that district courts must accordingly conduct the *Rule 403* balancing inquiry in a careful, conscientious manner that allows for meaningful appellate review of their decisions. District courts should also examine the relevant factors we discussed in *Glanzer*, those we articulated here, and any others that might have relevance to a particular case. Because the record before us shows that the district judge's decision to admit the evidence under *Rule 403* was conducted in a careful and conscientious manner, we can find no abuse of discretion. We therefore AFFIRM LeMay's convictions.

AFFIRMED.

CONCUR BY: Richard A. Paez (In Part)

DISSENT BY: Richard A. Paez (In Part)

DISSENT

PAEZ, Circuit Judge, concurring in part and dissenting in part:

I concur in all but Discussion § C of the majority's decision. I respectfully dissent from the majority's holding that the district court did not abuse its discretion in [*1032] admitting the evidence under *Fed. R. Evid. 403*. I would reverse the district court's *Rule 403* ruling and remand for reconsideration in light of our decision in *Doe by Rudy-Glanzer v. Glanzer, 232 F.3d 1258 (9th Cir. 2000)* [**32] (hereinafter *Glanzer*).

Generally, a "district court need not recite the *Rule 403* test when balancing the probative value of evidence against its potential for unfair prejudice" so long as "the record, as a whole, indicates that the court properly balanced the evidence." *United States v. Daly, 974 F.2d 1215, 1217 (9th Cir. 1992)* (citing *United States v. Morris, 827 F.2d 1348, 1350 (9th Cir. 1987)*. However, we recognized in *Glanzer* that "because of the inherent strength of the evidence that is covered by *Fed. R. Evid. [414]*, when putting this type of evidence through the *Fed. R. Evid. 403* microscope, a court should pay 'careful attention to both the significant probative value and the strong prejudicial qualities' of that evidence." *232 F.3d at 1268* (quoting *United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998))*.

In *Glanzer*, we identified five factors that district courts should consider in their *Rule 403* analysis: (1)" the similarity of the prior acts charged;" (2) the "closeness in time of the prior acts to the acts charged;" (3) "the frequency of the prior acts," (4) the "presence or lack of [**33] intervening circumstances;" and (5) "the necessity of the evidence beyond the testimonies already offered at trial." *232 F.3d at 1268*. [1] We went on to hold that "the district court [must] fully evaluate the factors enumerated above, and others that might arise on a case-by-case basis, and make a clear record concerning its decision whether or not to admit such evidence." *Id. at 1268-69*.

1 In *Glanzer*, we also explained that this list of factors is not exhaustive. The additional factors identified by the Tenth Circuit in *United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998)* are also helpful in conducting *Rule 403* analysis of *Rule 414* evidence:

> 1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; []4) whether the government can avail itself of any less prejudicial evidence[;] ... [5)] how likely it is

> such evidence will contribute to an improperly-based jury verdict; [6)] the extent to which such evidence will distract the jury from the central issues of the trial; and [7)] how time consuming it will be to prove the prior conduct.

[**34] Generally, evidence of prior criminal activity offered "to prove the character of a person in order to show action in conformity therewith" is not admissible. *Fed. R. Evid. 404(b)*. Such evidence is only admissible if it helps prove" motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ...." *Id. Rules 413*, *414*, and *415* reverse this traditional rule and create a "presumption in favor admission" for highly prejudicial evidence. *United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998)*. These rules were explicitly designed to allow the introduction of evidence of prior sexual crimes in order to prove propensity. *See* 140 Cong. Rec. H5437-03, *H5438 (daily ed. June 29, 1994) (statement of Rep. Kyl) ("In sex-related crimes, it can be particularly useful to demonstrate a propensity of the accused to commit similar prior offenses.").

Rules 413, *414*, and *415* were extraordinarily controversial at the time of their passage. The Judicial Conference Advisory Committee on Evidence Rules and the Judicial Conference Committee on Rules of Practice and Procedure both voted overwhelmingly to oppose the rules because they" [**35] would permit the introduction of unreliable but highly prejudicial evidence ...." *Fed. R. Evid. 413* hist. notes. The report submitted by the Judicial Conference to Congress expressed "significant [*1033] concern" about the "danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person." *Id.*

Nevertheless, there are benefits to these rules. As members of Congress repeatedly recognized, "in most rape or molestation cases, it is the word of the defendant against the word of the victim. If the defendant has committed similar acts in the past, the claims of the victim are more likely to be considered truthful if there is substantiation of other assaults." 140 Cong. Rec. H5437-03, *H5439 (daily ed. June 29, 1994) (statement of Rep. Kyl). This case, with two child victims and no other witnesses, is precisely the type of case for which *Fed. R. Evid. 414* was designed.

As courts, we are left to balance the public's interest in convicting those charged with sexual abuse crimes, as expressed in these evidentiary rules, with the right of the accused to be convicted only for the crime charged, and not his previous acts. LeMay served his sentence for his [**36] previous criminal acts, and he may not be punished again, unless the government can prove that he committed new crimes as well. The best way for district courts to balance these competing interests is to conduct the *Rule 403* analysis on the record, carefully considering each of the factors, and others as necessary, identified by this court in *Glanzer*.

In *Glanzer*, in contrast to this case, the district court did conduct the *Rule 403* analysis on the record. "The district court reiterated the factors used under the *Fed. R. Evid. 403* balancing test," but also considered "the remoteness in time" of the earlier act, the lack of similarity between the two incidents, the lack of a pattern of behavior, and the victim's reliability. *232 F.3d at 1269*. We observed that "it is difficult to imagine a scenario in which a district court could do more than the district court did in this case." *Id.*

In this case, the district court made no record of its *Rule 403* analysis at all. Unlike *Glanzer*, there was much more the district court could --and should --have done. In fact, the district court did not even identify the probative value of the evidence, only describing it as [**37] "relevant." There is a marked difference between describing evidence as relevant and describing it as having probative value significant enough to outweigh any unfair prejudicial effect. *See Old Chief v. United States, 519 U.S. 172, 184, 136 L. Ed. 2d 574, 117 S. Ct. 644 (1997)* ("What counts as the *Rule 403* 'probative value' of an item of evidence, as distinct from its Rule 401 'relevance, 'may be calculated by comparing evidentiary alternatives."). We explained in *Glanzer* that there is a presumption that prior sex crimes evidence is relevant. *232 F.3d at 1268* ("It is generally accepted that a defendant with a propensity to commit acts similar to those charged is more likely to have committed the charged act than another and therefore such evidence is relevant ...."). The probative value of evidence is determined by considering the strength of and the need for that relevant evidence.

In this case, the district court found that evidence of LeMay's prior conviction was "relevant" to bolstering the child witnesses' credibility and to rebutting the suggestion that there was no proof that a crime actually occurred. But the district court later made [**38] an explicit factual finding that the two victims were "extremely credible," that their testimony was clear, and that they testified with certitude and impressive demeanor. This, combined with the prosecution's own assertion that the children's testimony alone was sufficient for a conviction, suggests that the prior acts evidence had minimal probative value. [*1034] That minimal probative value should have been weighed against the risk of unfair prejudice to LeMay.

Because the district court did not conduct the 403 balancing on the record and consider the *Glanzer* factors, I would find that it abused its discretion. *See Koon v. United States, 518 U.S. 81, 100, 135 L. Ed. 2d 392, 116 S. Ct. 2035 (1996)* ("A district court by definition abuses its discretion when it makes an error of law."). But because the district court did not have the benefit of our later decision in *Glanzer*, I would reverse the *Rule 403* ruling and remand to the district court for reconsideration.

Although the majority undertakes a thoughtful *Rule 403* analysis, I believe that decision is better suited to the district court. Appellate courts have long recognized that we should give great deference [**39] to the evidentiary decisions of district courts. "The trial court in the exercise of its discretion is more competent to judge the exigencies of a particular case." *Brigham Young Univ. v. Lillywhite, 118 F.2d 836, 841 (10th Cir. 1941)*. In this case, the district court is in a far better position than we to assess the intangibles that are not conveyed well by a cold transcript: the persuasiveness of the young victims' testimony; the success of defense counsel's efforts to undermine their credibility; and the probative value the presentation of prior conviction would have had in the absence of the mother's testimony.

I do not quarrel with the district court's decision to defer its decision on the *Rule 414* evidence until after the victims' testimony. At the point at which the prosecution sought to admit the prior acts evidence, however, the district court's analysis should have been considered on the record. Furthermore, the district court should have considered each piece of proposed evidence individually and cumulatively. The testimony of the law enforcement officer, and the documentary evidence establishing the fact of LeMay's prior conviction, were certainly less [**40] prejudicial than the earlier victims' mother's emotional and graphic testimony, which was likely to generate a greater emotional reaction in the jury. *See Fed. R. Evid. 403* adv. comm. note ("'Unfair prejudice' ... means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."). There was no disagreement between the parties about whether the acts for which LeMay was earlier convicted were similar to the charged crimes. Proving similarity seems to be the primary purpose of the earlier victims' mother's testimony. Because there was no need to prove similarity, I do not see why the victims' mother needed to testify at all. The law enforcement officer and the documents should have been sufficient. The prosecution also conceded at the pretrial hearing on this evidence that it did not need the victims' mother to testify to prove the earlier acts.

If the district court were to find on remand that no evidence of a prior conviction should have been admitted under *Glanzer*, or at a minimum that the mother's testimony should have been excluded, LeMay would be entitled to a new trial. *Cf. United States v. Amador-Galvan, 9 F.3d 1414, 1418 (9th Cir. 1993)* [**41] (reversing a district court's evidentiary rulings and ordering that if, on remand, "the district court decides that disclosure of the informants' identities or admission of the expert testimony was necessary at trial, [the defendants]must be granted a new trial"). But if after balancing the factors, the district court were to determine that the probative value of this evidence outweighed its prejudicial effect, then the conviction should stand. Now with the benefit of our decision in *Glanzer*, the district court, in my judgment, is better suited to consider [*1035] the issue in the first instance. Accordingly, I dissent.

LEXSEE 362 F.3D 1241

Positive
As of: Jan 23, 2009

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LARRY DUANE SIOUX, Defendant-Appellant.

No. 03-30310

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

362 F.3d 1241; 2004 U.S. App. LEXIS 6421; 64 Fed. R. Evid. Serv. (Callaghan) 231

March 4, 2004*, Submitted

* The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

April 5, 2004, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Montana. D.C. No. CR-02-00003-RFC. Richard F. Cebull, District Judge, Presiding.

DISPOSITION: Affirmed.

COUNSEL: Jeffrey G. Michael, Esq., and Gary E. Wilcox, Esq., Billings, Montana, for the appellant.

William W. Mercer, United States Attorney, and Marcia Hurd, Assistant United States Attorney, Billings, Montana, for the respondent.

JUDGES: Before: Diarmuid F. O'Scannlain, Pamela Ann Rymer, and Jay S. Bybee, Circuit Judges. Opinion by Judge O'Scannlain

OPINION BY: Diarmuid F. O'Scannlain

OPINION

[*1242] O'SCANNLAIN, Circuit Judge:

We are called upon to decide whether *Federal Rule of Evidence 413* permits the admission of propensity evidence detailing sexual misconduct that occurred subsequent to the event giving rise to a pending trial.

I

On or about February 2, 2001, H.H. and several of her underage friends were drinking at an abandoned house on the Northern Cheyenne Indian Reservation in Lame Deer, Montana. In the wee hours of the morning, somebody at the party said that he thought [**2] he heard the police coming. As the partygoers scattered, H.H. hid in a dark bedroom in the back of the house and soon passed out.

H.H. eventually awoke to find herself naked, with Larry Sioux holding her down and having sexual intercourse with her. Through tears, she told Sioux to stop and attempted to push him away, but he held his hand over her mouth and continued to rape her. Finally, somebody came into the room and pulled Sioux off of H.H. A [*1243] few days later, H.H. told her school counselor that she had been raped at the party. The counselor made a formal report to her assistant principal, who in turn contacted tribal services to commence a full investigation.

On January 17, 2002, a federal grand jury handed down a single count indictment charging Sioux with sexual abuse in violation of *18 U.S.C. § 2242(2)*. [1] He was arrested on May 28, 2002 and pled not guilty at his preliminary appearance the following day. On October 16, 2002, Sioux requested *Rule 404(b)* notice [2] from the government. On October 29, 2002, the government responded by indicating that it planned to introduce testimonial evidence regarding a similar sexual assault com-

mitted by Sioux against [**3] one J.R.S. in May, 2001--approximately three months after he had assaulted H.H.

1 In relevant part, *§ 2242* provides:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison knowingly . . .
>
> (2) engages in a sexual act with another person if that other person is--
>
> (A) incapable of appraising the nature of the conduct; or
>
> (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 2242(2).

2 *Rule 404(b)* provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that *upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial.*" *Fed. R. Evid. 404(b)* (emphasis added).

[**4] On January 22, 2003, virtually upon the eve of trial, Sioux filed a motion in limine seeking to exclude evidence of that assault on grounds that it did not qualify for admission under *Rule 404(b)* or the multi-factor test governing similar *Rule 413* evidence set forth in *United States v. LeMay, 260 F.3d 1018, 1027-28 (9th Cir. 2001)*, and that its admission would violate his federal due process rights. However, Sioux never alleged that the admission of such evidence was improper because it involved another act of sexual misconduct that had occurred *subsequent* to that for which he was to stand trial. The government tersely responded on January 24, suggesting that Sioux's motion was untimely and, in any event, that the admission of the evidence was proper.

As trial opened on January 27, 2003, United States District Judge Richard F. Cebull indicated that he would reserve ruling on Sioux's motion until all of the government's evidence--except for J.R.S.'s testimony--had been received. Following the presentation of that evidence on January 27 and January 28, the government made an offer of proof regarding the content of J.R.S.'s testimony. Afterwards, Judge Cebull asked [**5] the government's attorney whether the subsequent nature of Sioux's alleged assault against J.R.S. was relevant to his determination. She replied that it was not. The court then heard argument on the motion from Sioux. Counsel never raised the issue of the event's timing in relation to the charged conduct, and Judge Cebull did not make any further inquiries concerning that issue. At the conclusion of the parties' exchange, Judge Cebull engaged in a conscientious evaluation of the *LeMay* factors and ultimately allowed J.R.S. to testify. [3]

3 Sioux does not allege that Cebull erred in conducting the *LeMay* balancing.

On January 28, 2003, the jury convicted Sioux of sexual abuse. Judge Cebull eventually [*1244] sentenced Sioux to 97 months' imprisonment, to be followed by 3 years of supervised release. Sioux timely appealed.

II

Prior to 1994, the admission of propensity evidence in sexual misconduct cases was severely restricted by *Federal Rule of Evidence 404(b)*, which generally [**6] forbids the introduction of such evidence "to prove the character of a person in order to show action in conformity therewith." *Fed. R. Evid. 404*. After years of turning back efforts to relax this longstanding bar, Congress passed *Rules 413, 414, and 415* as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-38. Together, these three rules "supersede[] *Rule 404(b)*'s restriction," *United States v. Guardia, 135 F.3d 1326, 1329 (10th Cir. 1998)*, by establishing a presumption--but not "a blank check"--favoring the admission of propensity evidence at both civil and criminal trials involving charges of sexual misconduct. *LeMay, 260 F.3d at 1022*; *United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998)*; *United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997)*; *United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997)*; *United States v. Sumner, 119 F.3d 658, 661-62 (8th Cir. 1997)*; *United States v. Larson, 112 F.3d 600, 604-05 (2d Cir. 1997)*. For its part, [**7] *Rule 413* in relevant part provides:

> In a criminal case in which the defendant is accused of an offense of sexual

> assault, evidence of the defendant's commission of *another* offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

Fed. R. Evid. 413(a) (emphasis added). [4]

> 4 Similarly, *Rule 414(a)* provides: "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."
>
> *Rule 415(a)* then renders the evidentiary standards established by *Rules 413 and 414* operative in civil cases: "In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in *Rule 413* and *Rule 414* of these rules."
>
> Due to the striking similarities between these rules and the fact that they are *in pari materia*, we have followed decisions interpreting each of these rules individually in cases interpreting their companions. *See, e.g., LeMay, 260 F.3d at 1027-30; Doe by & Through Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1267-69 (9th Cir. 2000).*

[**8] Sioux now contends that the admission of J.R.S.'s testimony alleging that he sexually assaulted her in May 2001 violated *Rule 413* because the sexual misconduct about which J.R.S. testified took place *after* the crime for which Sioux stood trial--the February 2, 2001 sexual assault of H.H. [5] In so arguing, Sioux has raised an [*1245] issue of first impression not only within the Ninth Circuit but, as best we can tell, nationwide.

> 5 Although we generally review evidentiary determinations involving an application of the Federal Rules of Evidence for abuse of discretion, we review de novo the district court's interpretation of those rules. *United States v. Angwin, 271 F.3d 786, 798 (9th Cir. 2001); United States v. Mateo-Mendez, 215 F.3d 1039, 1042 (9th Cir. 2000).* Because Sioux did not raise the specific objection he now presses while moving at trial to suppress the admission of J.R.S.'s testimony, the district court's decision to admit that evidence is subject only to plain error review. *See, e.g., United States v. Gomez-Norena, 908 F.2d 497, 500 (9th Cir. 1990)* ("[A] party fails to preserve an evidentiary issue for appeal not only by failing to make a specific objection, . . . but also by making the wrong specific objection. . . .") (citations omitted). To merit reversal in these circumstances, "There must be an 'error' that is 'plain' and that 'affects substantial rights.' " *United States v. Olano, 507 U.S. 725, 732, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993).* Even then, "the decision to correct the forfeited error [rests] within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.' " *Id. (quoting United States v. Young, 470 U.S. 1, 15, 84 L. Ed. 2d 1, 105 S. Ct. 1038 (1985)).*

[**9] A

We begin, as we must, with the text of the rule itself. For, where a "statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917)); see also Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992)* ("Courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). In turn, "the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co., 519 U.S. 337, 341, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997) (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477, 120 L. Ed. 2d 379, 112 S. Ct. 2589 (1992); McCarthy v. Bronson, 500 U.S. 136, 139, 114 L. Ed. 2d 194, 111 S. Ct. 1737 (1991)).*

We find the language of *Rule 413* unmistakably pellucid. It sanctions the admission of "evidence [**10] of the defendant's commission of *another* offense . . . of sexual assault." *Fed. R. Evid. 413(a)* (emphasis added). Used as it is here, the word "another" refers to "an additional one of the same kind: one more" or to "one of a set or group of unspecified or indefinite things" that has not already been contemplated. *Webster's Third New Int'l Dictionary of the English Language, Unabridged* 89 (1971). Sioux's alleged sexual assault of J.R.S. is plainly "of a kind" with his assault of H.H.; it is beyond serious dispute that such misconduct is part of the same "set or group" of acts declared relevant by Congress and made admissible on that basis.

Sioux's challenge hinges on assigning a temporal limitation to the word "another"--in particular, *precedence*. Yet, "another" contains no inherent chronological limitation, and to the extent the word is used in a necessarily temporal context, its most natural usage actually signifies *subsequence*. As the Oxford English Dictionary explains:

> *Another* is distinguished from *the other*, in that, while the latter points to the remaining determinate member of a known series of two or more, [**11] *another* refers indefinitely to *any* further member of a series of indeterminate extent. [In this sense, it means:] One more, one further; originally *a second* of two things; subsequently extended to anything additional or remaining beyond those already considered; an additional.

1 *Oxford English Dictionary* 495 (2d ed. 1989) (all emphases in original). Thus, while we in no way mean to suggest that *Rule 413* applies *only* to subsequent acts, we have little doubt that the plain language of the rule permits admission of subsequent acts evidence to the same extent it permits the introduction of evidence tending to demonstrate prior acts of sexual misconduct.

[*1246] B

This understanding of *Rule 413*'s plain language finds further support in the prevailing interpretation of the exceptions to *Rule 404(b)*. As it happens, *Rule 404(b)* uses language that is nearly identical to that of *Rule 413* and its companions. It provides that although "evidence of *other* crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith [such evidence may] be admissible for other purposes, such as proof of motive, opportunity, [**12] intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . ." *Fed. R. Evid. 404(b)* (emphasis added). Of course, the only difference between *Rule 404(b)*'s use of "other" and *Rule 413*'s use of "another" is number: The former precedes the plural "crimes, wrongs, or acts," while the latter precedes the (at least initially) singular "offense or offenses."

In spite of the fact that the "other crimes, wrongs, or acts" referred to in *Rule 404(b)* are "customarily referred to . . . as 'priors,' " Edward J. Imwinkelried, *Uncharged Misconduct Evidence* 2:12 at 2-75 (2003), the federal courts overwhelmingly have embraced what Professor Imwinkelried identifies as "the soundest view," *id.* at 2-78: namely, that the existing exceptions to *Rule 404(b)*'s general bar against the admission of propensity evidence allow for the introduction of *both* prior *and* subsequent bad acts evidence. *See, e.g., United States v. Hinostroza, 297 F.3d 924, 928 (9th Cir. 2002)* ("Our precedent has squarely resolved in the government's favor the issue that subsequent *Rule 404(b)* evidence may be relevant and admissible.") ([**13] *citing United States v. Bibo-Rodriguez, 922 F.2d 1398, 1400 (9th Cir. 1991)* ("By its very terms, *404(b)* does not distinguish between 'prior' and 'subsequent' acts."); *see also, e.g., United States v. Mohr, 318 F.3d 613, 617 (4th Cir. 2003); United States v. Anifowoshe, 307 F.3d 643, 646-47 (7th Cir. 2002); United States v. Germosen, 139 F.3d 120, 128 (2d Cir. 1998); United States v. Jones, 145 F.3d 959, 964 (8th Cir. 1998); United States v. Latney, 323 U.S. App. D.C. 417, 108 F.3d 1446, 1449 (D.C. Cir. 1997); United States v. Delgado, 56 F.3d 1357, 1364-65 (11th Cir. 1995); United States v. Osum, 943 F.2d 1394, 1404 n.7 (5th Cir. 1991)*. It is an elementary principle of statutory construction that similar language in similar statutes should be interpreted similarly, *see, e.g., Northcross v. Bd. of Educ. of Memphis City Schools, 412 U.S. 427, 428, 37 L. Ed. 2d 48, 93 S. Ct. 2201 (1973)*, and we see no reason to depart from that course here--where, by carving out an exception to the general bar against the introduction of propensity evidence, *Rules* [**14] *413, 414, and 415* perform the same function as *Rule 404(b)*'s own dispensations.

C

In the absence of any support for his proposed interpretation in the language, usage, or context of the rule, Sioux contends that "*Rule 413* itself is silent on the question whether the Act applies to subsequent as well as prior acts," and thus urges the court to turn to the legislative history of *Rules 413, 414, and 415* "to determine the intent of Congress." However, it is well-settled that "reference to legislative history is inappropriate when the text of the statute is unambiguous." *HUD v. Rucker, 535 U.S. 125, 132, 152 L. Ed. 2d 258, 122 S. Ct. 1230 (2002); see also W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98-99, 113 L. Ed. 2d 68, 111 S. Ct. 1138 (1991)* ("The best evidence of [legislative] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous--that has a clearly accepted meaning in both legislative and judicial practice--we do not permit it to be expanded or contracted [*1247] by the statements of individual legislators or committees during the course of the enactment process."); *R.R. Comm'n of Wisconsin v. Chicago, Burlington, and Quincy R.R. Co., 257 U.S. 563, 589, 66 L. Ed. 371, 42 S. Ct. 232 (1922)* [**15] ("Committee reports and explanatory statements of members in charge made in presenting a bill for passage . . . are only admissible to solve doubt and not to create it."); *In re Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989)* ("It would demean the constitutionally prescribed method of legis-

lating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some *evidence* about the law, while the *real* source of legal rules is the mental processes of legislators.") (emphasis in original). We therefore decline Sioux's invitation to troll *Rule 413*'s legislative history in search of statements that might-- or might not [6] -- contradict the plain language of the provision.

6 As our colleague Judge Kozinski has observed, "legislative history can be cited to support almost any proposition, and"--as in this case-- "frequently is." *Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986)* (Kozinski, J., concurring).

III

[**16] Because *Rule 413* unambiguously allows for the admission of subsequent acts evidence, there was no error in Judge Cebull's evidentiary determination. The judgment of the district court is hereby

AFFIRMED.